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Mead Coated Board, Inc. d/b/a Mead Southern Wood Products and Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE), AFL-CIO, Petitioner. Case 15-RC-8339

May 7, 2002

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on June 21, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 72 for and 58 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings¹ and recommendations, and finds that a certification of representative should be issued.

The Employer excepts, inter alia, to the hearing officer's recommendation to overrule its Objection 1, which alleged that the union observer maintained a separate voter eligibility, or *Excelsior*² list during the election.³ For the reasons set forth below, we affirm the hearing officer.

I. RELEVANT FACTS

There were two voting sessions during the election, one in the morning and the other in the afternoon. Walter Bell was an observer for the Petitioner during both sessions. In the morning session, Bell sat at a table with the

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² *Excelsior Underwear*, 156 NLRB 1236 (1966).

³ No exceptions were filed to, and we adopt pro forma, the hearing officer's recommendation that Objection 3 be overruled. Objection 2 alleged that the union observer's wearing of union insignia during the election was objectionable. The hearing officer overruled the objection. The Employer's exception argues that this conduct was objectionable in the context of Objection 1. As discussed below, we find nothing improper in regard to the Union's conduct as alleged in Objection 1. Accordingly, we find no merit in Objection 2.

Employer's observer, Jerry Miller, to monitor the maintenance of the official *Excelsior* list. Voters entering the balloting area would first approach Bell and Miller to have their names checked against the official *Excelsior* list.

Bell also maintained a separate copy of the *Excelsior* list as a challenge list. This list was given to Bell by Union Agent Eddie Barnes and was highlighted to indicate which voters the Union intended to challenge. Throughout the course of the morning session, Bell checked his copy of the list to ensure that he made the proper challenges. At various times, Bell kept the list on his lap, in a folder, and on the table. Bell needed to consult the list because he worked on the second shift, and was unfamiliar with the names and faces of the first and third shift voters who cast ballots in the morning. When Bell encountered a voter whose name was highlighted on his list, Bell informed the Board agent of his challenge. In the process, Bell would check off the names of the voters he challenged with a red "C" to indicate that the challenge was made. Bell also marked one name with a star to indicate that he had tried to challenge the voter's ballot but withdrew the challenge because the voter contested his alleged supervisory status. In addition, Bell knew that he had to challenge seven voters, and made a list of the numbers one through seven. Bell crossed out the numbers in order to indicate that the challenges had been made.

Bell testified that, during the afternoon session, he kept the list in a folder unless he was challenging a voter. Bell explained that, unlike in the morning session, he knew the voters' names and faces during the afternoon session because, like him, they were all second shift employees.

Credited testimony indicates that voters viewed Bell's activity in the context of the challenge procedure. The Employer's observer, Jerry Miller, confirmed that Bell made markings on his list only when he made a challenge. Employee Kenneth Sutton saw Bell's list when Bell challenged his vote. Employee Jerry Whitehead, a third shift employee, saw Bell mark his list when Bell challenged two employees, one of whom was Sutton. Employee Steven Nuckolls, another third shift employee, saw Bell's list and witnessed three challenges. Employee Charlie Waful, also third shift, witnessed a challenge when he saw the list as well. The Board agent at the election questioned Bell about his marking of the list, but did not forbid the use of it. There is no evidence that Bell marked the list for reasons unrelated to the challenge process.

II. ANALYSIS

A brief survey of the Board's decisions in this area, and the policies they serve, is helpful to introduce the

issue here. It is well established that the keeping of a list of who has or has not voted, aside from the official *Excelsior* list, may be grounds for setting aside an election. *Cross Pointe Paper Corp.*, 330 NLRB 658, 662 (2000). The purpose of this prohibition is to protect employees from fear of reprisal or discipline because they did or did not vote. *Masonic Homes of California*, 258 NLRB 41, 48 (1981). However, the Board has long recognized the right to refer to a challenge list as an exception to the general prohibition against keeping lists, in order to ensure that the parties have a full opportunity to challenge the ballots of voters they believe to be ineligible. See *Bear Creek Orchards*, 90 NLRB 286 (1950).

The Board's decision in *Sound Refining, Inc.*, 267 NLRB 1301 (1983), illustrates how these two policies—protecting employees, but preserving the rights of the parties—are accommodated. The Board in that case held that the use of a separate *Excelsior* list was impermissible where the union's purpose was to record each vote by checking off the name of every voter. But the Board also observed that if the list had been used for the purpose of ensuring that proper challenges were made, it would have been permissible activity. 267 NLRB at 1301 fn. 5.

Sound Refining suggests the proper rule for deciding this case. The Board in that case held that the use of a separate *Excelsior* list was grounds for setting aside an election where the union's purpose was to record each vote by checking off the name of every voter, and it could be inferred that the voters knew that their vote was being recorded. Where the duplicate *Excelsior* list was used neither to record who had or had not voted, nor in such a manner as to lead employees to reasonably believe that the list was being used other than to make challenges, there is no danger of coercion and no basis to set aside the election.

Here, the hearing officer found Bell's list to be a bona fide challenge list. Further, the employees who testified stated they observed Bell's list being used solely for challenge purposes. Thus, there is no evidence either that Bell's list was maintained for an improper purpose or that employees reasonably believed it was being used for an improper purpose. Accordingly, consistent with the principles discussed above, we find no basis to overturn the election.

In reaching this conclusion, we acknowledge that the better practice is not to use a duplicate *Excelsior* list as the challenge list because of the danger that employees might perceive that it is being improperly used to record who did or did not vote. See Casehandling Manual (Part Two) Elections, Secs. 11312.4, 11322.1, and 11338.2

(observers may bring a list of employees they intend to challenge, or alternatively note on the official eligibility list at the preelection check the persons they intend to challenge, but may not maintain a list of those who have or have not voted); see also *Milwaukee Cheese Co.*, 112 NLRB 1383, 1384 (1955) (overruling union's objection to election, where Board agent prohibited union's observer from using duplicate *Excelsior* list as a challenge list). However, we also recognize that, as a general principle, the Board agent has "broad discretion in deciding the details of an election, and unless he acts arbitrarily or capriciously, the Board will abide by his judgment on these matters." *East Texas Pulp & Paper Co.*, 114 NLRB 885, 887 (1955). See, e.g., *Inland Waters Pollution Control*, 306 NLRB 342 (1992) (Board agent's refusal to allow a late union observer into the polling area was not an abuse of discretion warranting the setting aside of the election).

Here, for the reasons discussed above, we find that the Board agent did not abuse his discretion by not prohibiting Bell's use of the separate *Excelsior* list as a challenge list.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Paper, Allied Industrial, Chemical & Energy Workers International Union, (PACE), AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time and those classified as temporary production and maintenance employees, including all planer mill, saw mill, wet yard, kiln, shipping, store room clerks, utility, and maintenance, employed by the Employer at its Cottonton, Alabama facility; excluding all office clerical employees, professional employees, guards, and supervisors as defined by the Act.

Dated, Washington, D.C. May 7, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD